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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1535

LEON TROLL, as Executor of the Estate of MORRIS NEWMAN, Deceased,
Petitioner,

v.

ABRAHAM BORUT,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

LEON MALMAN,
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April 10, 1974.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No.

LEON TROLL, as Executor of the Estate of Morris Newman, Deceased,

Petitioner,

v.

ABRAHAM BORUT,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

The petitioner, Leon Troll, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 28, 1974.

Opinion Below

No opinion was rendered by the Court of Appeals. The opinion of the District Court (unreported) appears in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 28, 1974. This petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U. S. C. §1254(1).

The jurisdiction of the District Court was invoked because of diversity of citizenship, the petitioner (defendant) being a citizen of Pennsylvania and the respondent (plaintiff) being a citizen of New York.

Questions Presented

1. Whether the equitable doctrine of unconscionability applies to the facts of this case so as to defeat a claim for the equitable relief of specific performance where the amount sought to be paid is less than 1/20th of the value of the property sought to be specifically obtained.

2. Whether this court should resolve the conflict between the decision below and the decision in *Marks v. Gates*, 154 Fed. 481 (C. A. 9, 1907), where specific performance of a written contract was denied on the basis of the equitable doctrine of unconscionability because enforcement would result in the transfer of property for about 1/13th of its value.

Statement of the Case

In July, 1952, the respondent, the petitioner's decedent and three other individuals organized and became equal shareholders in a corporation (Roaring Brook Acres, Inc.) to buy and hold title to approximately 400 acres of vacant land in Putnam County, New York. This land has always been the corporation's only asset. The five individuals also signed an agreement which states that if any of them *wished* to dispose of any of his shares he was to "offer in writing * * * to sell * * * to the remaining stockholders, and the remaining stockholders shall purchase the stock so offered." (Italics supplied.) The agreement also purports to require that the purchase price be "the actual cost of the shares of stock so of-

fered." Payment for shares so purchased was in each case to be made within 60 days after the offer to sell. In addition, the agreement states that if a shareholder died the surviving shareholders would purchase and his personal representative would sell his shares on the above terms.

During the next two years the shares of three of the shareholders were brought by the decedent and the respondent. In each case the sale was a voluntary act by a consenting person. At the time of each such purchase the value of the land owned by the appellant had not increased significantly. By December, 1954, the decedent owned 70% of the shares of the corporation, at a cost to him of $6,250. The respondent owned the remaining 30% of the shares, at a cost to him of $3,000. Both parties had agreed in writing to this 70/30 relationship. This situation remained unchanged until June 3, 1972, when the decedent died.

The petitioner qualified as executor of the decedent's will on July 7, 1972. On July 6, 1972, the respondent sent to the petitioner's attorney a copy of the above shareholders' agreement with a letter stating that it was his *"intention* • • • to exercise the option and right to purchase [the decedent's] stock in [the corporation] as outlined in the agreement." (Italics supplied.) On August 6, 1972, the respondent wrote another letter to the petitioner's attorney referring to his previous letter in which he had advised "of [his] intention & readiness to exercise the option, and buy [the decedent's] stock • • •." He asked to be advised "when the [appellant] is prepared to comply with the terms of [the] agreement."

Under the terms of the agreement payment for shares being purchased was required to be made within 60 days after the death of the decedent. This 60-day period

expired on August 2, 1972. *No payment for the shares was made or tendered before August 3, 1972.*

In 1971 the corporation offered the property for sale for $200,000. No sale was made.

On August 8, 1972, a qualified and well-recognized real estate appraiser, John H. Baldwin, of Braislin, Porter & Wheelock, Inc., completed and sent to the petitioner's attorney an appraisal of the corporation's above real property. In it he concluded that the fair market value of the above land was $200,000. The respondent has admitted that this is the fair market value of the land at the time of decedent's death by failing to controvert the petitioner's Rule 9(g) statement to that effect and by failing to submit any different appraisal.

Money required to pay the real estate taxes on the property, and other expenses, was advanced to the corporation by the respondent and the decedent. These amounts were carried on the corporation's books as loans. None of these "loans" had ever been repaid. At the time of decedent's death these "loans" totalled $28,183, $10,250 of which was from the respondent and $17,978 from the decedent.

Assuming that these advances were true loans, and deducting them from the above $200,000 fair market value of the corporation's real property, the decedent's interest in that property (through his shares in the corporation) is worth 70% of the net amount ($171,817), which is $120,272. By this action the respondent seeks to buy that interest for $6,250, which is *1/20th* of the value of that interest.

REASONS FOR GRANTING THE WRIT

1. The doctrine of unconscionability is an important equitable doctrine. Its viability is implicitly questioned by the result in this case. The Supreme Court should consider and resolve this question.

The equitable doctrine of unconscionability is a significant weapon in the law's arsenal, designed to do equity and prevent injustice. Its effectiveness in doing so is illustrated by the case of *Marks v. Gates,* 154 Fed. 481 (C. A. 9, 1907), which has been cited with approval and as authoritative in varying fact situations by numerous Circuit Courts of Appeal and highest state courts, most recently in *U. S. v. Georgia-Pacific Company,* 421 F. 2d 92, 104 (C. A. 9, 1970).

In *Marks* the plaintiff unsuccessfully sought specific performance of a contract by which, in consideration for the payment of $12,225, the defendant promised in writing to give the plaintiff one fifth of all property which the defendant should acquire in Alaska. At the time the agreement was made the defendant had never been to Alaska nor did he have any property there. Subsequently he acquired property there which was stated to be worth a total of $750,000. The dismissal by the District Court of the plaintiff's complaint for specific performance "on the ground that the contract set forth in the complaint is so unjust and inequitable as not to entitle the [plaintiff] to relief" was affirmed on appeal. The Court of Appeals said:

> "• • • where the consideration is so grossly inadequate as it is in the present case, and the contract is made without any knowledge at the time of its making on the part of either of the parties thereto of the nature of the property to be af-

> fected thereby, or of its value, no equitable principle is violated if specific performance is denied * * *" (154 Fed. 481, 483).

Neither of the courts below actually considered and passed upon the viability of this doctrine. The Circuit Court affirmed without opinion. The opinion of the District Court (set forth in the Appendix) does not reflect any such consideration either. Its comment (Appendix, p. 14) is a quotation from a New York Court of Appeals case that "more than mere disparity between option price and current value * * * must be shown." But surely a price/value ratio of 1:20 is more than a *mere* disparity. Its other comment is a textual quotation which is not supported by the cases cited for it.

However, the effectiveness of the doctrine of unconscionability to prevent injustice is impaired so long as the doubt as to its applicability which is raised by the result in this case persists. The Supreme Court should remove that doubt by considering and unequivocally upholding the doctrine.

2. Review by the Supreme Court will eliminate the conflict between *Marks v. Gates*, 154 Fed. 481 (C. A. 9, 1907), decided by the Ninth Circuit Court of Appeals, and this case, decided by the Second Circuit Court of Appeals.

This conflict has been described sufficiently above and need not be elaborated further here.

3. Elementary justice requires a review and reversal of the decision below.

Equity and fairness require a reversal of the decision below because that decision leads to a wholly unjust

result—the exchange of $120,000 for $6,250. To say that this result is justified or required by the terms of the contract between the parties begs this entire question. The true function of the law is to do substantial justice, not to enforce literally the terms of contracts which produce inequitable results. Equity will not enforce a contract made as the result of a *unilateral* mistake, even though such a result defeats the expectations of the other party. This case is really not different in any way.

Conclusion

For the above reasons, a writ of certiorari should issue to review the judgment of the Second Circuit.

April 10, 1974.

Respectfully submitted,

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APPENDIX.

Opinion by Wyatt, U. S. D. J., Dated May 21, 1973

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE.]

Appearances:

Botein, Hays, Sklar & Herzberg, Esqs., Attorneys for Plaintiff, 200 Park Avenue, New York, New York 10017
Alvin H. Schulman, Esq., Stuart I. Parker, Esq., Of Counsel.

Leon Malman, Esq., Attorney for Defendant, 6 Grace Avenue, Great Neck, New York 11021.

WYATT, District Judge,

These are two motions, one by defendant for summary judgment and the other (a cross motion made after defendant had moved) by plaintiff for summary judgment. Fed. R. Civ. P. 56.

The action is for the specific performance of an agreement dated July 12, 1952.

Under date of July 12, 1952, the five stockholders of Roaring Brook Acres, Inc. (Brook; a New York corporation) made a written agreement between themselves and with Brook ("the 1952 agreement"). The effect of the 1952 agreement was to keep all stock of Brook in the hands of some or all of the five then stockholders. The 1952 agreement provided that the following statement should appear on all "shares" (presumably on the certificates):

> "This stock is transferable only in accordance with the terms of the agreement between the corporation and divers stockholders, dated July 12, 1952, and now on file with the corporation, as well as proof of due compliance therewith".

See New York Personal Property Law §176. Apparently the statement was placed on all stock certificates.

By the end of 1954, all the stock of Brook (100 shares outstanding) was owned by plaintiff Borut and by Morris Newman, 30 shares by Borut and 70 by Newman. The "actual cost" (the 1952 agreement, para 4) to Borut of his 30 shares was $3,000; the "actual cost" to Newman of his 70 shares was $6,250.

Newman died on June 3, 1972. Apparently he had been a resident and citizen of New York.

Under date of June 13, 1972, the attorney for defendant Troll, "nominated" as executor of Newman, wrote to Borut asking for information about Brook.

Under date of July 6, 1972, Borut wrote the attorney for the estate of Newman and sent him a copy of the 1952 agreement, notifying him that Borut intended "as the sole surviving stockholder to exercise the option and right to purchase" Newman's stock in Brook.

Defendant Troll, a Pennsylvania citizen, on July 7, 1972 qualified as Newman's executor; evidently the probate proceedings were in New York.

Under date of August 6, 1972, Borut wrote to the attorney for the Newman estate asking "when the . . . estate is prepared to comply with the terms" of the 1952 agreement.

On August 21, 1972, the attorney for the Newman estate wrote Borut, expressing interest in a discussion of the "estate's position" regarding the stock purchase agreement.

Believing that the estate was declining to comply with the 1952 agreement, Borut, on November 16, 1972, commenced this action for specific performance of the 1952 agreement, that the estate sell 70 shares of Brook to Borut for Newman's "actual cost" of $6,250.

Opinion by Wyatt, U. S. D. J., Dated May 21, 1973

1.

Borut is a citizen of New York; Troll, the executor, is a citizen of Pennsylvania. Although Newman was a citizen of New York, it is normally the citizenship of the executor which controls and diversity jurisdiction seems here to exist. Wright, Federal Courts (2d ed.) 95

2.

The provisions of the 1952 agreement are specific as to the restrictions on the sale of any shares. If a living stockholder wishes to sell shares, the 1952 agreement provides as follows:

> "1. That no stockholder shall sell, assign, transfer, pledge, encumber, or in any way dispose of any or all of the shares of the stock of the corporation which may now or hereafter be held or owned by him, nor shall any of such shares be transferrable, except to the remaining stockholders, in equal shares.
>
> "2. That in the event that any stockholder shall wish to dispose of any or all of his stock in the said corporation, he shall offer in writing as hereafter set forth to sell it in equal shares to the remaining stockholders, and the remaining stockholders shall purchase the stock so offered in equal shares as hereinafter set forth.
>
> "3. That every such offer shall be in writing, and shall state that the offeror offers, severally and not jointly, to sell a part or all of his stock in the Corporation; and if a part of his stock, the number of shares offered for sale; and a copy of such offer, signed by the offeror, shall be sent by registered mail, to each of the other stockholders

who may then be a stockholder of the Corporation and a party to this agreement, and a duplicate copy of such offer, so signed and mailed, shall be similarly signed and mailed to the Corporation at its then principal place of business.

"4. That within sixty (60) days from the date of such delivery, each of the said stockholders to whom a copy of the offer has been delivered, shall pay to the offeror a sum equal to a pro rata share of the actual cost of the shares of stock so offered.

"5. That simultaneously with the receipt of each such payment, the offeror shall deliver to each such remaining stockholder a pro rata portion of all his shares of stock so offered, duly endorsed in blank, with the proper federal and state transfer stamps thereunto attached, together with his written resignation as an officer and/or director of the Corporation (if he shall be an officer or director thereof, or both), together with the like resignation of any nominee of such offeror who may then be an officer and/or director of the Corporation."

If a stockholder dies, the shares of Brook held by him at the time of death are governed by the following provision of the 1952 agreement:

"6. That upon the death of any stockholder, the remaining stockholders who may then be stockholders of the Corporation and parties to this agreement shall severally purchase the shares of stock of the Corporation owned or held by the stockholder so deceased, at the time of his death, as though an offer to sell had been made by such stockholder at the date of his death, under paragraph '2' of this agreement; and the terms, pro-

> visions and conditions of this agreement shall apply to and govern the personal representative or representatives of such deceased stockholder."

By its plain terms, the 1952 agreement requires the Newman estate to sell its 70 shares of Brook to Borut for $6,250 and requires Borut to buy them at that price.

The only asset of Brook is real estate and while its exact value is uncertain, it is without dispute that the land has greatly increased in value over the more than 20 years since its purchase by Brook. Borut contests the value suggested by Troll but it is clear that the Newman shares are worth more than $100,000 or many times their "actual cost" of $6,250.

This is a situation where specific performance ought certainly to be decreed if the applicable provision of the 1952 agreement is valid.

3.

The argument for the estate is that the 1952 agreement places an invalid restraint on the alienation of the Brook shares.

We need not consider whether the restraints as between the living shareholders were invalid or not. Since at least the end of 1954 there have been only two stockholders: plaintiff Borut and decedent Newman.

The applicable provision requires that the Newman estate sell to the survivor, plaintiff Borut, the Brook shares at their "actual cost".

For twenty years, Newman, with full knowledge of the contract provision, did nothing to question its validity. His estate for the first time raises a question.

The law of New York governs in this diversity case; as noted already, Brook is a New York corporation and Borut and Newman were residents of New York.

A well known treatise states that the courts "have enforced" agreements requiring the estate of a deceased stockholder to sell to the surviving stockholders. 2 O'Neal, Close Corporations, 41.

New York appears consistently to have enforced such agreements.

An agreement between two stockholders that upon the death of one, his or her shares of stock must be sold at book value to the survivor, was enforced in *Aron v. Gillman*, 309 N. Y. 157 (1955).

Two stockholders of a corporation agreed that on the death of either, the corporation would purchase the shares of the decedent for $25,000. Specific performance was granted. *Greater N. Y. Carpet House v. Herschmann*, 258 App. Div. 649, 17 N. Y. S. 2d 483 (1st Dept. 1940) A similar agreement was enforced in *In re Klaum's Will*, 294 N. Y. S. 2d 877 (Surrogate's Court, Nassau County, 1968).

There is no discussion in the opinions cited of the validity of the agreement. It appears to be assumed. In one opinion, it has been stated: "Agreements between stockholders for the purchase and sale of stock by the one first to die have been time and again the subject of judicial determinations and have been held to be valid . . .". *Murphy v. George Murphy, Inc.*, 166 N. Y. S. 2d 290, 292 (Sup. Ct., N. Y. Cty., 1957)

There was discussion of the validity of restrictions on corporate shares in *Allen v. Biltmore Tissue Corp.*, 2 N. Y. 2d 534, 161 N. Y. S. 2d 418 (1957). The restriction was there upheld but the restriction was in the form of an option at the original price on issuance, rather than a mandatory buy-sell provision as in the case at bar. The Court said that if the provision were one "rendering the sale of the stock impossible to anyone except the corporation at whatever price it wished to pay, we would, of course, strike it down as illegal." (161 N. Y. S. 2d

at 423) The significant words here seem to be "at whatever price it wished to pay"; in the case at bar, the price is fixed at "actual cost".

The decisions on which defendant relies are clearly distinguishable. For example, in *Rafe v. Hindin,* 29 A. D. 2d 481, 288 N. Y. S. 2d 662 (2d Dept., 1968), the stock could only be sold to the other stockholder but no price was stated and the stock could not be sold to a third party without the consent of the other stockholder.

4.

The defendant argues that the disparity between the present value of the shares and their "actual cost" makes it unconscionable to enforce the agreement.

This argument was considered and rejected in the *Allen* case (cited above). Judge (then) Fuld said (161 N. Y. S. 2d at 424): ". . . the validity of the restriction on transfer does not rest on any abstract notion of intrinsic fairness of price. To be invalid, more than mere disparity between option price and current value of the stock must be shown."

No New York decision has been found which refused to enforce a buy-sell agreement because of disparity between price and value. There is a dictum in *Palmer v. Chamberlin,* 191 F. 2d 532, 540-41 (5th Cir. 1951) which might support defendant, but I decline to accept the dictum under the circumstances of the case at bar. And, as in the *Palmer* case, Newman himself took advantage of the restrictive provisions to purchase shares of Brook in the early years.

The treatise already cited states: "The courts, however, have repeatedly refused to invalidate a transfer restriction simply because it required transfer of shares at a price below their value. In some instances, the disparity has been great, the value of the shares being ten,

twenty or even over a thousand times as great as the transfer price". 2, O'Neal, at 19

Specific performance of an agreement similar to that here (except that the corporation operated a family business) was decreed where the contract price was $1 per share and the "actual value was not less than $1060 per share". *In re Mather's Estate,* 410 Pa. 361, 189 A. 2d 586 (1963)

5.

The other points made by defendant have been considered but are not of sufficient merit for discussion.

The motion of defendant for summary judgment is denied.

The motion of plaintiff for summary judgment is granted.

Settle judgment on notice.

Dated: New York, New York
May 21, 1973

INZER B. WYATT
United States District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1535

LEON TROLL, as Executor of the Estate of MORRIS NEWMAN, Deceased,

Petitioner,

v.

ABRAHAM BORUT,

Respondent

MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

This memorandum is submitted in opposition to a petition for a writ of certiorari to review a diversity action judgment, which the Court of Appeals for the Second Circuit unanimously affirmed, from the bench, on the written opinion of the District Court Judge. Troll, the petitioner, does not contend that the judgment conflicts with New York law, which governs this diversity action. Instead, Troll asks this Court to resolve a non-existent conflict between the Second and Ninth Circuits and to review a question of New York law, which he erroneously claims was never considered and passed upon by the courts below.

The Court of Appeals affirmed a judgment of the United States District Court for the Southern District of New York ordering Troll, the Executor of the estate of Morris Newman ("Newman"), to specifically perform a stockholder's reciprocal buy-sell agreement (the "Agreement"). It is

a garden variety stockholders agreement, of the type that "have been time and again the subject of judicial determinations and have been held to be valid". *Murphy* v. *George Murphy, Inc.*, 7 Misc. 2d 647, 648-49, 166 N.Y.S. 2d 290, 292 (Sup. Ct. N.Y. Co. 1957). The Agreement was entered into July 12, 1952 by, among others, Newman and the plaintiff-respondent, Abraham Borut ("Borut"). The judgment required Troll to sell to Borut, as the Agreement provided he must, for their original cost, certain shares of stock owned by Newman at the time of his death. In his written decision District Judge Wyatt denied Troll's motion for summary judgment dismissing the complaint and granted Borut's motion for summary judgment ordering specific performance of the Agreement.

The issue presented to the Court of Appeals in this diversity action was whether the District Court, sitting as a court of equity, abused its discretion in ordering Troll to specifically perform the Agreement. Troll now argues that this Court should issue a writ of certiorari because both the Court of Appeals and Judge Wyatt failed to consider whether the equitable doctrine of unconscionability applied to the facts of this case. Troll also argues that this Court should review the judgment below because it is in conflict with a pre-*Erie* case, *Marks* v. *Gates*, 154 Fed. 481 (9th Cir. 1907).

First, there is nothing to Troll's contention at page 6 of his petition that neither Judge Wyatt nor the Court of Appeals "actually considered and passed upon" his argument with respect to unconscionability. Troll's argument is that a court of equity should refuse to specifically enforce a stockholder's reciprocal buy-sell agreement on the ground of unconscionability when there is a great disparity between the purchase price set forth in the buy-sell agree-

ment and the fair market value of the stock at the time of the sale. The portion of Judge Wyatt's opinion printed at pages 14 and 15 of Troll's petition leaves no doubt that Judge Wyatt considered and rejected Troll's argument. And, of course, the Court of Appeals' unanimous affirmance from the bench, on Judge Wyatt's opinion, is testimony not to that Court's failure to consider Troll's points, but rather to the insubstantiality of his argument. Judge Wyatt said:

> The defendant argues that the disparity between the present value of the shares and their "actual cost" makes it unconscionable to enforce the agreement.
>
> This argument was considered and rejected in the *Allen* case (cited above). Judge (then) Fuld said (161 N.Y.S. 2d at 424): ". . . the validity of the restriction on transfer does not rest on any abstract notion of intrinsic fairness of price. To be invalid, more than mere disparity between option price and current value of the stock must be shown."
>
> No New York decision has been found which refused to enforce a buy-sell agreement because of disparity between price and value. There is a dictum in *Palmer* v. *Chamberlin,* 191 F. 2d 532, 540-41 (5th Cir. 1951) which might support defendant, but I decline to accept the dictum under the circumstances of the case at bar. And, as in the *Palmer* case, Newman himself took advantage of the restrictive provisions to purchase shares of Brook in the early years.
>
> The treatise already cited states: "The courts, however, have repeatedly refused to invalidate a transfer restriction simply because it required transfer of shares at a price below their value. In some instances, the disparity has been great, the value of the shares being ten, twenty or even over a thousand times as great as the transfer price". 2, O'Neal, at 19

Troll's real complaint, therefore, is that he is dissatisfied with Judge Wyatt's opinion and the New York case law it follows.

With regard to Troll's contention that there is a conflict between the Circuits, we need only say that this case is governed by, and was decided under, New York law, while the *Marks* case, which pre-dates *Erie,* was decided under "federal common law." Moreover, *Marks* involved a promise to transfer property that had not even been acquired at the time the promise was made. Here all the stockholders knew what was involved when they entered into the Agreement and were perfectly aware that the stock's value might appreciate substantially between the date of the Agreement and the time of the death of any one of them.

The District Court and Court of Appeals followed well settled New York case law in ordering specific performance of the Agreement. Their action clearly does not warrant review by the Supreme Court.

The Petition for a Writ of Certiorari Should be Denied.

Respectfully submitted,

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BOTEIN, HAYS, SKLAR & HERZBERG
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Dated: New York, New York
May 9, 1974

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ABRAHAM BORUT,

Respondent

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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May 22, 1974

IN THE

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OCTOBER TERM, 1973

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LEON TROLL, as Executor of the Estate of MORRIS NEWMAN, Deceased,

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v.

ABRAHAM BORUT,

Respondent

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This reply memorandum deals briefly with the substantive matter on pages 2 and 3 of the memorandum in opposition.

The *Allen* language quoted on page 3 relied on concludes with the statement that to "be invalid, more than mere disparity in price between option price and current value of the stock must be shown." That is precisely the point of the doctrine of unconscionability: the difference must be more than merely disparate; it must be great enough to move the conscience of a court of equity. We believe that the conscience of this court should, and will, be moved by an attempt to buy property for 1/20th of its value. We are not alone in so reading *Allen:*

(a) In Note: *Corporations: Stock Transfer Restrictions: Allen v. Biltmore Tissue Corp.,* 44 Cornell L. Q.

133 (1958), the comment is made that "[I]f the fair market value of the stock greatly exceeded the price received by the corporation when the stock was issued, a decree of specific performance might work a forfeiture and thus be denied."

(b) In the recent New York case of *Kowalsky v. Familia,* 71 M. 2d 287, 336 N. Y. S. 2d 37 (Sup., 1972), the court analyzed and discussed *Allen* in detail and then distinguished it because the statement in *Allen* (relied on by the District Court) that "the validity of the restriction on transfer does not rest on any abstract notion of intrinsic fairness of price" (2 N. Y. 2d 534, 543, 161 N. Y. S. 2d 418, 424), was not applicable to the facts involved in *Kowalsky,* where land worth $26,000 was sought to be purchased for $2,000 (a ratio of 1 to 13).

The statement that no New York decision has been found which refused to enforce a buy-sell agreement because of disparity between price and value is irrelevant, even if it is accurate. What is more to the point is that no New York case has been found which enforced a buy-sell agreement despite a demonstrated *unconscionable* disparity between price and value, as in our case. Indeed, no New York case has been found in which the doctrine of unconscionability in this context has even been considered. Nevertheless, there have been cases both in New York and in other jurisdictions where the doctrine of unconscionability has been applied.

Furthermore, as was said in *Holt v. Seversky Electronatom Corp.,* 452 F. 2d 31, 34 (C. A. 2, 1971):

> "Even if there is an absence of controlling state authority, we are forced, as a federal court vested with diversity jurisdiction, to do the best we can in estimating 'what the state court would rule to be its law.' *Bernhardt v. Polygraphic Co. of Amer-*

> *ica, Inc.*, 350 U. S. 1982, 209, 76 S. St. 273, 279, 100 L. Ed. 199 (1956) (Frankfurter, J., concurring)."

The lack of precedent in a given fact situation is no reason for denying relief. The uniqueness and beauty of the common law, and the source of its strength, is that it can and does apply a settled legal doctrine to new sets of facts and in new contexts, as they arise. Is this not what Judge Rifkind meant when he said in *Paris v. Metropolitan Life Ins. Co.*, 94 F. Supp. 792, 796 (S.D.N.Y. 1947):

> "However, there is a short answer to this argument. When a chancellor for the very first time awarded counsel fees in a class or representative suit, he undoubtedly similarly disappointed the expectations of those who took no account of the development of law. Since it is fair that those who benefited from the efforts of the petitioners should share in the burden, the mere fact that in the past similarly situated beneficiaries escaped is not a valid reason for making that immunity eternal."

The District Court quoted in its opinion from 2 O'Neal: *Close Corporations* 19. Examination of that volume shows that the cases cited therein to support the quoted statement are all distinguishable from our case. In two of the cited cases the ratio of price disparity was substantially below our disparity ratio of 1:20. In another the required sale at the very low price was triggered by a discharge for cause of the employee who owned the stock. In another the defendant shareholder had previously confirmed the selling price fixed in the agreement on *two* separate occasions by refusing opportunities to cancel the agreement. Another case cited is *Allen v. Biltmore Tissue Corp.*, which has been shown above to be not in point on this question.

The last case cited is *In re Mather's Estate,* 410 Pa. 361, 189 A. 2d 586 (1963), which is also cited in the opinion below (53a). However, examination of the opinion in *Mather* shows that it is not in point (as the District Court intimated) because it was expressly based on the principle of upholding a family agreement, "which are always favored in the law." Also, in *Mather* the decedent had himself gotten the benefits of the agreement by making share purchases on the death of other members of the family at 1/50th, or less, of the value of the shares. Clearly this was not so in our case; the decedent's purchases were made only from living shareholders who voluntarily offered their shares, at a time when there had been no appreciable increase in value.

Lastly, it should be noted that, in the very same paragraph in O'Neal from which the court below quoted, there appears the following textual statement:

> "On the other hand, some courts have indicated that they will not enforce a restriction if the transfer price is so small in relation to the true value of the shares as *to make the restriction unconscionable or oppressive,* or to be indicative of fraud or mistake." (Italics supplied.)

This petition should be granted.

Respectfully submitted,

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